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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 719

JOSEPH BRANCH, individually and as attorney for the Board of Education of Halifax County, North Carolina, and W. HENRY OVERMAN, individually and as Superintendent of Schools of Halifax County, North Carolina, and ROM PARKER, individually and as County Attorney for Halifax County, North Carolina, and L. M. WILLIAMS, individually and as Principal of T. S. Inborden High School, Halifax County, North Carolina, and C. M. MOORE, JR., MRS. J. C. SHEARN, HENRY L. HARRISON, MRS. V. I. MOHORN, SR., C. H. LEGGETT, MRS. ROBERT ROBINSON and J. D. WHITEHEAD, individually and as members of the Board of Education of Halifax County, North Carolina, and R. L. COPPAGE, PERCY F. THORNE, MRS. WILLIS M. MORRISETTE, MRS. FRANCES ARNOLD and E. W. COPELAND, individually and as members of the District School Committee of District V, Halifax County, North Carolina, *Petitioners*

v.

WILLA JOHNSON, individually and as a representative of a class composed of herself and other Negro school teachers of Halifax County, North Carolina, similarly situated, and as a representative of a class composed of herself and other Negro citizens of Halifax County, North Carolina, similarly situated, *Respondent*

On Petition for Writ of Certiorari To the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

PHILIP J. HIRSCHKOP
BERNARD S. COHEN
1513 King St.
Alexandria, Virginia 22314

WILLIAM M. KUNSTLER
ARTHUR KINOY
511 Fifth Avenue
New York, New York

Counsel for Respondent

Date: Dec. 23, 1966

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT	4
I. The Opinion of the Court of Appeals Is Based Upon Facts Which Are Fully Supported by the Record	4
II. The Court of Appeals Found Clear Error as Required by Rule 52(a) of the Federal Rules of Civil Procedure	6
III. The Court of Appeals for the Fourth Circuit Is Not in Conflict With Its Own Prior Decisions	8
IV. This Decision Is Not in Conflict With Similar Rulings of the Court of Appeals for the Fifth Circuit	9
CONCLUSION	11

CITATIONS

CASES:

Alston v. Butts, — F. Supp. —, 9 Race Rel. L. Rep. 1356 (E.D. N.C. 1964)	5
Alston v. School Board of City of Norfolk, 112 F. 2d 992 (4th Cir. 1940)	8
Barenblatt v. United States, 360 U.S. 109 (1959)	11
Blow v. North Carolina, 379 U.S. 684 (1965)	5
Bomar v. Keyes, 162 F. 2d 136 (2d Cir. 1947)	11
Campbell v. Barsky, 265 F. 2d 463 (5th Cir. 1959)	7
Chambers v. Hendersonville City Board of Education, 364 F. 2d 189 (4th Cir. 1966)	8
Cox v. Louisiana, 379 U.S. 536 (1965)	7
Edwards v. South Carolina, 372 U.S. 229 (1963)	7

Page

Franklin v. County School Board of Giles County, 360 F. 2d 325 (4th Cir. 1966) 8
Haynes v. Washington, 373 U.S. 503 (1963) 7
Henry v. Coahoma County Board of Education, 353 F. 2d 648 (5th Cir. 1965) 9, 10
Holt v. Virginia, 381 U.S. 131 (1965) 7
Johnson v. Branch, 242 F. Supp. 721 (E.D. N.C. 1965), *rev'd* 364 F. 2d 177 (4th Cir. 1966) 2, 6
Kuhn v. Princess Lida of Thurn and Taxis, 119 F. 2d 704 (3rd Cir. 1941) 6
Maple Island Farm, Inc. v. Bitterling, 209 F. 2d 867 (8th Cir. 1954) 7
Morris v. Williams, 149 F. 2d 703 (8th Cir. 1945) 11
Mothner v. Ozark Real Estate Co., 300 F. 2d 617 (8th Cir. 1962) 6
Parker v. Board of Education of Prince George's County, 348 F. 2d 464 (4th Cir. 1965) 8, 9, 10
Shelton v. Tucker, 364 U.S. 479 (1960) 10
Special Service Co. v. Delaney, 172 F. 2d 16 (5th Cir. 1949) 7
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 10
United States v. Beard, 260 F. 2d 81 (9th Cir. 1958) .. 6, 7
United States ex rel Binion v. O'Brian, 273 F. 2d 495 (3rd Cir. 1960) 6
United States v. Board of Education of Greene County, Mississippi, 332 F. 2d 40 (5th Cir. 1964) 9, 10
United States v. U. S. Gypsum Co., 333 U.S. 364 (1948) 6
Western Casualty & Surety Co. v. Herman, 318 F. 2d 50 (8th Cir. 1963) 6
Wieman v. Updegraff, 344 U.S. 183 (1952) 10

FEDERAL RULES OF CIVIL PROCEDURE:

Fed. R. Civ. P. 15(b) 10
Fed. R. Civ. P. 52(a) 6

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Petitioners

v.

WILLA JOHNSON, individually and as a representative of a class composed of herself and other Negro school teachers of Halifax County, North Carolina, similarly situated, and as a representative of a class composed of herself and other Negro citizens of Halifax County, North Carolina, similarly situated,

Respondent

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BRIEF FOR RESPONDENT IN OPPOSITION

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinion of the District Court (App. A of Petition) is reported at 242 F. Supp. 721. The opinion of the Court of Appeals for the Fourth Circuit, and the dissenting opinion (App. B of Petition) are reported at 364 F. 2d 177.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The briefs of the petitioner and of the Amicus Curiae pose four basic questions:

1. Did the Court of Appeals consider matters not in evidence?

2. Did the Court of Appeals find clear error as required by Rule 52(a) of the Federal Rules of Civil Procedure?

3. Did the Court of Appeals decide this matter in conflict with its own prior decisions?

4. Is this decision in conflict with similar rulings of the Court of Appeals for the Fifth Circuit.

STATEMENT

Respondent accepts the statement of petitioners with regard to all dates and the sequence of happenings. However, she strongly disputes petitioners' statement

as to her record as a teacher, the resolution of any conflict she allegedly had with her principal, the actions of District School Committee No. 5 in considering her employment, and the District School Committee's knowledge of her close association with the civil rights struggle.

Respondent was an exemplary teacher. She was rated as an overall excellent teacher by her own principal. The superintendent of schools similarly regarded her. She was uncommonly competent in her classroom endeavors and extremely active in school extracurricular activities. On March 10, 1964 the principal wrote her concerning seven minor infractions, such as being fifteen minutes late for game duty one night, having an unkempt closet, etc. On March 31, 1964 the principal wrote respondent that he would recommend her for re-employment contingent upon her improvement. He subsequently did sign her contract without any qualification and in fact, she did not commit even a minor infraction after March 10, 1964.

At the time that respondent's contract was subject to renewal, this small town was caught in the turmoil of racial conflict. Major civil rights suits were being litigated, demonstrations were in progress and Negroes declared their candidacy for various local and state offices. The leaders of this whole movement were respondent, her husband, her father and her uncle. This was a well publicized fact known to the petitioners. In fact, respondent's husband was a well-publicized candidate for high state office, opposing petitioners' counsel, Julian R. Allsbrook. Amid this turmoil, School District Committee No. 5 failed to renew respondent's contract without any investigation or in-

quiry of the superintendent, respondent's official record, or even the school principal. This action was taken at an extraordinary meeting of the district committee, with the unexplained presence of a member of the county school board, after a member of the county board had threatened respondent's husband at a polling place that a teacher would be fired.

ARGUMENT

I. The Opinion of the Court of Appeals Is Based Upon Facts Which Are Fully Supported By the Record

Petitioners' allegations that numerous factual conclusions of the Court of Appeals are not supported by the record are clearly erroneous. That section of petitioners' brief is nothing but a rehashing of their Petition for Rehearing below. Respondent is fully prepared, should this Court so desire, to substantiate every material point, stated in the opinion of the Court of Appeals, by proper reference to the record.

The petitioners clearly knew of respondent's civil rights involvement. Petitioner Williams testified that he knew of respondent's attitude regarding civil rights activities in Enfield. (Appellees' appendix below, hereinafter referred to as D—, at 39). Petitioner Thorne admitted knowing of respondent's husband's civil rights activities. (Appellant's appendix below, hereinafter referred to as P—, at 93). Petitioner Coppage similarly knew of the civil rights activities of respondent's family (P. 95) and in fact singled out respondent's husband to petitioner Thorne at a polling place. (P. 121). One of the petitioners even approached respondent's husband at a polling place and threatened that a teacher would be fired. (P. 21). The above cite but a few of the many instances in the record concerning petitioners' knowledge of respond-

ent's involvement with civil rights as fully set forth in appellant's brief below.

Nor is there merit in petitioners' contention that the Court of Appeals could not reach conclusions on the size, racial proportions, racial atmosphere, actions of the town council, etc. of Enfield, North Carolina. Not only is the record replete with facts to support these conclusions but the Court of Appeals could take judicial notice of all these matters which were fully matters of public record. The court certainly knew of two other major civil rights suits arising in Enfield, *Blow* v. *North Carolina*, 379 U.S. 684 (1965) (a case resulting from mass picketing) and *Alston* v. *Butts*, 9 Race Rel. L. Rep. 1356 (E.D. N.C. 1964) (a successful voter registration suit in which members of respondent's family were plaintiffs).

Petitioners further maintain that the Court of Appeals erred in concluding that petitioners only considered the infractions of the letter of March 10, 1966, in not rehiring respondent. Respondent discussed this at length in the appellant's brief below. The testimony of the Committee members conclusively supports the opinion of the Court of Appeals in this matter. (P. 87, 93-95, 116, 118-120, 122).

In the interest of brevity respondent has only cited a few instances above. Respondent respectfully submits that this Court should not accept petitioners' unfounded assertions concerning the factual findings of the Court of Appeals for the Fourth Circuit sitting *en banc* without a detailed examination of the complete record in this matter and the briefs below which discuss these matters at length.

II. The Court of Appeals Found Clear Error As Required By Rule 52(a) of the Federal Rules of Civil Procedure

Rule 52(a) provides that findings of fact by a district judge may not be set aside unless clearly erroneous. A finding is clearly erroneous ". . . when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948). See *Mothner* v. *Ozark Real Estate Co.*, 300 F. 2d 617 (8th Cir. 1962); *Western Casualty and Surety Co.* v. *Herman*, 318 F. 2d 50, 56 (8th Cir. 1963); *United States* v. *Beard*, 260 F. 2d 81 (9th Cir. 1958), *cert. denied*, 358 U.S. 874, rehearing denied, 358 U.S. 913.

The Fourth Circuit, sitting *en banc*, with only one judge dissenting (not on this issue), stated twice in its opinion that the District Court's findings were clearly erroneous. (364 F. 2d at 179, 181)

The petitioners testified only briefly during the final hearing. A much greater part of their evidence was in the form of depositions, affidavits, and memoranda. In reviewing this evidence, the Court of Appeals had no less opportunity than the trial judge to observe witnesses. See *United States ex rel Binion* v. *O'Brien*, 273 F. 2d 495 (3rd Cir. 1960). Additionally, incorrect conclusions drawn from facts not in dispute are clearly erroneous, and the appellate court had authority to correct them. *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 F. 2d 704 (3rd Cir. 1941). Moreover, where, as here, constitutional issues of moment emerge from mixed findings of fact and law, the authority of an appellate court to take an independent view of the whole record is plain. Indeed, this Court has taken such a view even in cases coming from the state courts,

over which the Supreme Court does not have a general supervisory power analogous to that of the Court of Appeals over the District Court. See, *e.g.*, *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Holt* v. *Virginia*, 381 U.S. 131 (1965).

Many tests of what is "clearly erroneous" have been considered and applied. An appellate court may reverse when it is convinced by examination of the entire record that a mistake has been committed. *United States* v. *Beard*, *supra*. An appellate court may reverse when it has a conviction that an injustice has been done. *Campbell* v. *Barsky*, 265 F. 2d 463 (5th Cir. 1959). An appellate court may reverse when there is a misapprehension of the evidence by the District Court and its decision is so clearly erroneous that it is against the truth and right of the case. The Court of Appeals may give effect to its own conclusions. *Special Service Co.* v. *Delaney*, 172 F. 2d 16 (5th Cir. 1949). An appellate court may reverse when the findings of fact are against the clear weight of evidence. *Maple Island Farm, Inc.* v. *Bitterling*, 209 F. 2d 867 (8th Cir. 1954), *cert. denied*, 348 U.S. 882, *rehearing denied*, 348 U.S. 921.

In reversing the opinion of the District Court in the instant case, it is readily apparent that the Court of Appeals for the Fourth Circuit was convinced by examination of the entire record that a mistake had been made, that the decision of the District Court was against the truth and right of the case, that an injustice had been done, and that the District Court's decision was against the clear weight of the evidence. Having a definite and firm conviction that a mistake had been committed, the Court of Appeals properly reversed.

III. The Court of Appeals for the Fourth Circuit Is Not In Conflict With Its Own Prior Decisions

Petitioner and Amicus contend that the instant decision is in conflict with the prior holding of this Court of Appeals in *Parker* v. *Board of Education of Prince George's County,* 348 F. 2d 464 (4th Cir. 1965). To the contrary, there is no conflict in this circuit and this Court of Appeals has a long-standing line of decisions supporting this case. As long ago as 1940 this circuit held:

> As teachers holding certificates from the State, plaintiffs have acquired a professional status. It is true that they are not entitled by reason of that fact alone to contracts to teach in the public schools of the state; for whether any particular one of them shall be employed to teach is a matter resting in the sound discretion of the school authorities; but . . . they are qualified school teachers and have the civil right, as such, to pursue their profession without being subjected to discriminatory legislation on account of race or color. *It is no answer to this to say that the hiring of any teacher is a matter resting in the discretion of the school authorities.* Plaintiffs, as teachers qualified and subject to employment by the state, are entitled to apply for the positions and to have the discretion of the authorities exercised lawfully and without unconstitutional discrimination as to the rate of pay to be awarded them, if their applications are accepted. (emphasis added) *Alston* v. *School Board of City of Norfolk,* 112 F. 2d 992, 996-97 (4th Cir. 1940).

Those principles have been adhered to not only in the instant case, but also recently by this circuit in the major cases of *Franklin* v. *County School Board of Giles County,* 360 F. 2d 325 (4th Cir. 1966) and *Cham-*

bers v. *Hendersonville City Board of Education,* 364 F. 2d 189 (4th Cir. 1966). Nor does the *Parker* case, *supra;* in any way contravene these principles. *Parker* is clearly distinguishable from these other decisions of this circuit. Parker was a first year teacher whose "engagement was simply probationary. . . ." 384 F. 2d at 465. Relying upon this fact, the Court of Appeals affirmed the District Court decision upon "the failure of the complaint to state a claim upon which relief could be granted." *Id.* at 465.

IV. This Decision Is Not In Conflict With Similar Rulings of the Court of Appeals for the Fifth Circuit

Petitioner and Amicus both contend that the instant decision has produced a conflict between this circuit and rulings in two factually similar cases in the Court of Appeals for the Fifth Circuit. Respondent not only submits that there is no conflict between the circuits but indeed, even if there was, there are abundant decisions by this Court on the legal issues herein which should resolve any conflict.

The briefs of the petitioner and Amicus rely on the cases of *United States* v. *Board of Education of Greene County, Mississippi,* 332 F. 2d 40 (5th Cir. 1964) and *Henry* v. *Coahoma County Board of Education,* 353 F. 2d 648 (5th Cir. 1965) to buttress their arguments. Accepting the findings of the District Courts *arguendo* in each of these cases, they do not in any way contravene the line of law in this area as enunciated by this Court or the fourth circuit in the instant decision or its other decisions, *supra.* The Greene County and Henry cases, *supra* were distinquishable on their factual findings. Indeed, this Court refused to grant a writ of certiorari in the *Henry* case, U.S. , 16 L. Ed. 674 (1966).

While the *Henry* case involved failure to renew a contract for a teacher with considerable experience, it was affirmed by the fifth circuit on the basis that (a) the plaintiff had failed to carry her burden of proof and (b) that the plaintiff should not be allowed to amend her complaint pursuant to Rule 15(b) of the Federal Rules of Civil Procedure to conform to defendants' evidence at the time of trial. If there are any questions of law in *Henry* bearing upon the instant case, they are in Judge Brown's concurring opinion where he states that if Mrs. Henry's dismissal was in violation of her constitutional rights, then that court would enjoin her failure to be re-employed. Such was the ruling herein.

In the *Greene County* case, supra, the fifth circuit merely held in a brief opinion that the plaintiff was only a new teacher, 332 F. 2d at 44, and that it failed to find clear error in the District Court's opinion and accordingly adopted that opinion. The *Greene County* case is in complete accord with the fourth circuit's holding in *Parker* v. *Board of Education of Prince George's County, Maryland, supra.* There also a probationary (new teacher) was allegedly dismissed for cause and the Court of Appeals affirmed upon "failure of the complaint to state a claim upon which relief could be granted. . . ." 348 F. 2d at 464.

Certainly, neither the instant decision nor any of the above decisions are in conflict with the great body of law of this Court as set forth in, *e.g., Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Wieman* v. *Updegraff,* 344 U.S. 183 (1952); *Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957). Similarly, the instant decision is in accord with numerous decisions of other circuits, *e.g.,*

Bomar v. *Keyes,* 162 F. 2d 136 (2nd Cir. 1947); *Morris* v. *Williams,* 149 F. 2d 703 (8th Cir. 1945).

This Court has always encouraged vigilance where the rights and academic freedom of teachers are at stake. The fourth circuit has followed such a principle in this case. As this Court has stated:

> [W]hen academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion . . . into this constitutionally protected domain. Barenblatt v. United States, 360 U.S. 109, 112 (1959).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP J. HIRSCHKOP
BERNARD S. COHEN
1513 King Street
Alexandria, Virginia 22314

WILLIAM M. KUNSTLER
ARTHUR KINOY
511 Fifth Avenue
New York, New York
Counsel for Respondent